BEFORE THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

OFFICE OF DISCIPLINARY COUNSEL,

Complainant,

v. **No. 12-0195**

H. JOHN ROGERS,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. ARGUMENT

This matter is before the Court pursuant to the "Hearing Panel Subcommittee's Findings of Fact, Conclusions of Law and Recommended Sanctions" (hereinafter "Findings")" issued on March 27, 2013, wherein the Hearing Panel Subcommittee properly found that Respondent did not provide evidence sufficient to mitigate the sanction of annulment of his license to practice law. Further, the Hearing Panel Subcommittee found that because Respondent knowingly and intentionally entered pleas of *nolo contendere* to the crimes of False Swearing and Filing a Malicious Application to Declare a Person Mentally Ill or Inebriate and which did result in the involuntary hospitalization of Mr. Shade and has been convicted of the same, Respondent violated Rule 8.4(b), Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct.

At this stage in the proceedings, this Court has held that "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994). Respondent cannot meet this burden and has produced no evidence that the Hearing Panel Subcommittee's Findings are not supported by the overwhelming evidence presented in this matter. Respondent's convictions for False Swearing and Filing a Malicious Application to Declare a Person Mentally Ill or Inebriate are final and Respondent's pleas of *nolo contendere* are deemed to be a conviction within the meaning of Rule 3.18(c) of the Rules

of Lawyer Disciplinary Procedure. Furthermore, the evidence of his convictions on the record satisfy the Office of Disciplinary Counsel's burden of proving Respondent's violations of the Rules of Professional Conduct. Syl. Pt. 2, Committee on Legal Ethics v. Six, 181 W.Va. 52, 380 S.E.2d 219 (1989).

A. The Hearing Panel Subcommittee's Findings are supported by reliable and probative evidence and do not lack in factual predicate.

Respondent argues that the Hearing Panel Subcommittee did not place the events of July 27, 2009, into context and consider that Respondent believed he was helping Jeffrey Shade when he filed the mental hygiene petition against him. Further, that the witnesses who were interviewed by the State Police had a common agenda due to family or business relationships with each other. Respondent also argues that neither the State Police nor the Office of Disciplinary Counsel interviewed every witness present at the café that day and that these circumstances demonstrate that the Office of Disciplinary Counsel did not meet its burden in proving Respondent's misconduct.

Respondent's arguments that the Hearing Panel Subcommittee's Findings lack a factual basis should be disregarded by this Honorable Court. The hearing that took place on August 22, 2012, was a mitigation hearing held pursuant to Rule 3.18 of the Rules of Lawyer Disciplinary Procedure predicated on Respondent's *nolo contendere* pleas to the misdemeanor crimes of False Swearing and Filing a Malicious Application to Declare a Person Mentally Ill or Inebriate. The purpose of the mitigation hearing is not for Respondent to collaterally attack the conviction, or for the Office of Disciplinary Counsel to prove the

underlying criminal charges. The purpose was to provide Respondent with an opportunity to introduce evidence of mitigating factors which may have bearing on the extent of punishment to be imposed on Respondent based upon his criminal convictions. Committee on Legal Ethics v. Boettner, 183 W.Va. 136, 394 S.E.2d 735 (1990).

West Virginia's Rules of Lawyer Disciplinary Procedure provide the legal framework for governing lawyer discipline including disciplinary proceedings which are initiated against a lawyer based upon a final criminal conviction. Rule 3.18(c) of the Rules of Lawyer Disciplinary Procedure clearly provides that a plea or verdict of guilty or a conviction after a plea of nolo contendere shall be deemed a conviction within the meaning of this rule." Rule 3.18(e) further provides, in part, that " . . . the order or judgement, . . . shall be conclusive evidence of the guilt of the crime or crimes which the lawyer has been convicted, ..." West Virginia, along with the vast majority of jurisdictions of the United States, provide that criminal convictions serve as conclusive proof in disciplinary proceedings. *See*, In the Matter of Disciplinary Proceedings against Smith, 246 P.3d 1224 (Wash. 2011) (citing at least 42 other states, including West Virginia, and the District of Columbia which allow criminal convictions to serve as conclusive proof in disciplinary proceedings). The Supreme Court of Washington explained:

> "[the Rule] provides that 'the record of conviction shall be conclusive evidence.' The purpose of this last quoted clause is apparent. We have no power to review the judgments of the Federal courts and must accept them as binding on us. The legislature, realizing the futility of going behind the record of

> conviction in any such case, made that record conclusive evidence and we must accept it as such."

Smith, 246 P.2d at 1230, *quoting* In re Proceedings for Disbarment of Finch, 287 P. 677 (Wash. 1930).

Attorney disciplinary proceedings are also not the appropriate forum for providing an attorney a second opportunity to refute criminal charges. As explanation as to why the constitutionality of procedures and rules providing that a conviction of an attorney is conclusive proof of guilt, the Maryland Supreme Court stated:

> The requirements of due process having been satisfied at the criminal trial, and the attorney's guilt having been established beyond a reasonable doubt at that proceeding, a new or other inquiry into the guilt of the attorney for disciplinary purposes is not mandated by either the State or Federal Constitution.

Md. State Bar Ass'n v. Rosenberg, 329 A.2d 106, 108 (Md. 1974). *See also*, Florida Bar v. Lancaster, 448 So.2d 1019, 1021-22 (Fla. 1984) (a *nolo contendere* plea along with an adjudication of guilt is sufficient to sustain disciplinary action).

Disciplinary proceedings initiated under Rule 3.18 of the Rules of Disciplinary Procedure are not meant to provide Respondent with another opportunity to argue the motives behind his decision to file the mental hygiene petition. Respondent's opportunity to make these arguments and present his defense was in his criminal case. Respondent voluntarily chose to enter a *nolo contendere* plea rather than proceed to a jury trial and now he must accept the consequences of that decision on his license to practice law.

The Hearing Panel Subcommittee's Findings and its Recommendation are properly supported by the evidence on the record by a certified copy of Respondent's *nolo contendere* pleas and final convictions for False Swearing and Filing a Malicious Application to Declare a Person Mentally Ill or Inebriate. [ODC Ex. 3, Section B, Bates No. 126; ODC Ex. 3, Section C, Bates No. 529] Respondent's criminal convictions clearly reflect adversely on his honesty, trustworthiness and fitness as a lawyer and the Hearing Panel Subcommittee properly recommended that Respondent's law license be annulled based upon his criminal convictions.

B. Respondent's argument that his "uncounseled plea" should offer mitigation in his favor is without merit.

Respondent essentially argues that he did not enter into the pleas because he was, in fact, guilty but rather because he wanted to spare the "local authorities" the expense of a trial and to "bring this whole matter to a conclusion." *See*, Respondent's Brief at p. 4. It is acknowledged that an ethics complaint filed by Mr. Shade against Respondent had been pending against Respondent since late 2009. However, once criminal proceedings involving the same allegations as the ethics complaint were initiated against Respondent, the Office of Disciplinary Counsel deferred its investigation of the ethics complaint until the termination of the criminal proceedings against Respondent. *See*, Committee on Legal Ethics v. Pence, 161 W.Va. 240, 240 S.E.2d 668. The Indictment was filed against Respondent on or about

January 25, 2010, and the criminal proceedings took nearly two (2) years to complete as Respondent was not sentenced until January 23, 2012.[1]

In a disciplinary proceeding based upon his final criminal conviction, Respondent cannot now assert his innocence to the same criminal acts. The proper place to have asserted his innocence was is in the underlying criminal case.[2] Unlike in State ex rel. O'Neill v. Gay, 169 W.Va. 16, 285 S.E.2d 637 (1981), where one of the defendants was taken to the magistrate's private residence after his arrest, then entered an uncounseled plea of guilty and was sentenced on the same night, Respondent knowingly and voluntarily entered his "uncounseled" pleas of *nolo contendere* and the same were accepted by the magistrate court in an open session of court as conclusive evidence of his guilt. On Respondent's November 30, 2011 Guilty or No Contest Plea, Respondent knowingly waived his right to have an attorney represent him by placing his initials on the line next to the statement which read "I give up my right to have an attorney represent me." [ODC Ex. 3, Section B, Bates No. 514; ODC Ex. 3, Section C, Bates No. 968] Respondent also acknowledged, by placing his signature on page 2 of the Guilty or No Contest Plea, that "I am entering this plea voluntarily,

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[1] Respondent's comment that "it made no difference to [ODC] what the outcome of the criminal proceeding is taken out of context and is not an accurate reflection of ODC's statements. *See*, Hrg. Transcript at p. 20. An acquittal on a criminal charge does not preclude disciplinary charges on the same facts because the parties and the standard of proof are different. Committee on Legal Ethics v. Gorrell, 185 W.Va. 419, 407 S.E.2d 923 (1991).

[2] Respondent also asserted that he was unfamiliar with magistrate court criminal procedure. However, the Prosecuting Attorney of Wetzel County, Timothy E. Haught, testified at the hearing in this matter that he has known Respondent both professionally and personally for approximately twenty-three (23) years. [Hrg. Trans. at pp. 45-46] Mr. Haught also testified Respondent sued "his office once as prosecuting attorney over a magistrate case –." [Hrg. Trans. at p. 46].

and not the result of force or threats or of promises apart from a plea agreement. I have informed the magistrate of any prior discussions between the prosecuting attorney and me or my attorney that led to my willingness to plead guilty or no contest." [ODC Ex. 3, Section B, Bates No. 515; ODC Ex. 3, Section C, Bates No. 969] The magistrate also acknowledged, by his signature and date, that "I have addressed the defendant personally and in open court and have informed the defendant of the matter matters set out above, and find that the defendant understands. I find further that the foregoing waiver of rights and plea are made knowingly and voluntarily by the defendant, and I accept the defendant's plea." [ODC Ex. 3, Section B, Bates No. 515; ODC Ex. 3, Section C, Bates No. 969]

Moreover, Respondent is an attorney with nearly fifty (50) years of experience in court rooms and in representing clients. There is absolutely no evidence that Respondent somehow blundered into entering an uncounseled plea of *nolo contendere*. He is clearly not an inexperienced attorney who might for some inexplicable reason have no understanding of the plain language contained in the waiver or of magistrate court rules, in general. Furthermore, Respondent's arguments regarding his plea are not properly raised in his disciplinary proceeding as the Hearing Panel Subcommittee would not have authority to make a determination as to the sufficiency of the Respondent's plea of *nolo contendere*.

In a matter involving attorney discipline after a *nolo contendere* plea to criminal conspiracy and obstruction of justice, the South Carolina Supreme Court, considering the respondent attorney's arguments regarding the admission or exclusion of evidence pertaining to the circumstances of the *nolo* pleas, noted that "[t]o allow a respondent to assert his

innocence of the crime for which he has been convicted would totally nullify the intentions of the Rule [Section 6 of the Rule on Disciplinary Procedure which reads, in part, '[a] certificate of conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against him based on the conviction." In the Matter of Rish, 256 S.E.2d 540, 541-42 (S.C.1979). The South Carolina Court also cited with approval to a Maryland case, Bar Association of Baltimore City v. Siegal, 340 A.2d 710 (Md. 1975), in which the respondent attorney sought to show that two U.S. Attorneys had recommended that he not be prosecuted, that the prosecution was overzealously pursued, and that his *nolo contendere* plea was entered into because his health did not permit him to undergo an extended trial. The Maryland Court stated:

> [W]e cannot accept as "compelling extenuating circumstances" those proffers by the respondent which in essence call upon us to assess the integrity of the criminal conviction itself that prior adjudication is conclusive and thus cannot be attacked in a disciplinary proceeding by invoking this Court to reweigh or to re-evaluate the respondent's guilt or innocence. Id., 340 A.2d at 713.

Rish, 256 S.E.2d 540.

Respondent had an opportunity to raise these arguments in the appeal of his criminal conviction. He availed himself of his right to appeal his magistrate criminal conviction and filed an appeal of the conviction in the Circuit Court. This appeal was denied and he then filed an appeal of his criminal conviction to the Supreme Court of Appeals of West Virginia. This appeal was also denied. *See*, Supreme Court No. 12-1184. Therefore, Respondent's

criminal convictions for false swearing and filing of a malicious application to declare a person mentally ill or inebriate are final.

Respondent's argument regarding the effect of his *nolo contendere* plea in Division of Motor Vehicles (DMV) matters versus attorney disciplinary matters likewise is misplaced. In Miller v. Wood, 229 W.Va. 545, 729 S.E.2d 867 (2012), this Honorable Court dealt with the issue of whether motorists, who had pled *nolo contendere* to driving under the influence, could have their driver's licenses automatically revoked without an administrative hearing. This Court answered in the negative and stated that "a person entering a nolo contendere (no contest) plea to a second or subsequent offense defined in W.Va. Code § 17C–5-2 (2010) is entitled to an administrative license revocation hearing before the Office of Administrative Hearings." The Court determined that pursuant to W.Va. Code § 17C-5A-1a(a) (2010), a plea of *nolo contendere* does not constitute a conviction for the purposes of W.Va. Code § 17C-5A-1a(a) (2010) except where the person holds a commercial license or operates a commercial vehicle.

Unlike in the Wood case, Respondent's license to practice law was not automatically annulled due to his criminal conviction based upon his *nolo contendere* plea. In the matters involving the Department of Motor Vehicles, W.Va. Code § 17C–5A-1a(a) (2010) contains an express definition of what constitutes a conviction, either a guilty plea or a finding of guilt by a jury or court. In attorney disciplinary matters, Rule 3.18(c) of the Rules of Lawyer Disciplinary Procedure specifically provides that a conviction after a plea of *nolo contendere* is considered to be the same as a guilty plea and thus, a conviction after a plea of *nolo*

contendere can be used as basis for imposing discipline upon an attorney's license to practice law. Respondent was afforded an opportunity, under this same rule, to request a mitigation hearing and his request was granted. Moreover, as discussed *supra*, there is extensive legal precedent in the United States which provide that criminal convictions, including those convictions arising out of pleas of *nolo contendere*, can serve as conclusive proof in disciplinary proceedings. *See also*, In the Matter of Troisi, 202 W.Va. 390, 504 S.E.2d 625 (1998) (attorney was disciplined pursuant to proceeding filed under Rule 3.18 of the Rules of Lawyer Disciplinary Procedure after attorney pleaded *nolo contendere* to one count of battery).

C. The Hearing Panel Subcommittee properly found that Respondent's mitigating factors did not outweigh the aggravating factors in this matter and his misconduct.

Respondent proposed to have seventy-five (75) anonymous witnesses testify at his mitigation hearing on Respondent's work in "Narc. Family" and the "12 Step Program." The majority of Respondent's witnesses were excluded by the Hearing Panel on the grounds that he did not comply with the provisions of Rule 3.4 of the Rules of Lawyer Disciplinary Procedure because they were only identified by a first name and town. Rule 3.4 provides in part that Respondent should provide "the complete identity, address and telephone number of any person with knowledge about the facts of any of the charges; provide a list of the proposed witnesses to be called at the hearing, including their addresses, telephone numbers, and a summary of their anticipated testimony; . . . ." It is not disputed that Respondent is recognized as a committed member of meetings employing the "12 Step Program."

However, the primary purpose of attorney disciplinary proceedings is the protection of the public and reassurance of the public as to the reliability and integrity of attorneys. Committee on Legal Ethics v. Ikner, 190 W.Va. 433, 438 S.E.2d 613 (W.Va. 1993). Anonymous witnesses cannot in any way reassure the public as to the integrity of attorneys and the disciplinary process, especially since the Supreme Court of Appeals has held that attorney disciplinary proceedings are open to the public for that very purpose. " . . . [O]nce it is determined that there is probable cause to issue a formal charge, the constitutionally recognized interests served by public disclosure outweigh any necessary restrictions upon access to information for the benefit of individual attorneys or the profession as a whole." Daily Gazette Co. Inc. v Committee on Legal Ethics, 326 S.E.2d 705, 712-13 (W.Va. 1985). Respondent was not denied an opportunity to submit evidence of his work in "12 Step" organizations and evidence of his extensive work with these programs was part of the record submitted to the Hearing Panel Subcommittee for consideration. *See in general*, ODC Ex. 11, Transcript of Respondent's Sentencing Hearing, January 23, 2012.

Although Respondent's belief that evidence of his "pure heart" was not considered is understandable, the Hearing Panel Subcommittee properly weighed Respondent's evidence and determined the evidence to have little weight. These disciplinary proceedings against Respondent were initiated pursuant to Respondent's conviction, after entering *nolo contendere* pleas, to the charges of false swearing and filing a malicious application to have a person declared mentally ill or inebriate. The evidence produced in this matter, including the testimony of Jeffrey Shade, Jill Shade, and James Long, about the events of July 27,

2009, clearly establish that Respondent's statement that Mr. Shade assaulted him in his notarized mental hygiene petition he filed were not true. While Mr. Shade testified that no physical altercation took place at his café that day, another witness, Jill Shade, testified that earlier in the day when Respondent said "[a]nd you're next" while pointing at Mr. Shade, Respondent came forward and "poked" Mr. Shade in the shoulder. [Hrg. Trans. at pp. 206, 27]. At his sentencing hearing in January 2012, Respondent argued that he believed that Mr. Long, who did not honor a subpoena to testify in the criminal matter, would provide exculpatory evidence.[ODC Ex. 11, Bates Nos. 1142-1143]. However, Mr. Long appeared and testified at the August 22, 2012 disciplinary hearing. Mr. Long, who admittedly was only in Barristas Café for one of the times Respondent came into the café that day, testified that he saw Respondent slap Mr. Shade on the back. [Hrg. Trans. at p. 136]. Finally, the evidence also clearly established that Respondent's assertion in his mental hygiene petition that Mr. Shade was in the midst of a fragile drug induced mental state on or about July 27, 2009, was not true either. Mr. Shade testified he was not addicted to drugs at the time and he was released from the secure facility immediately upon examination by a mental health professional and dismissed from the probable cause hearing. [Hrg. Trans. at pp. 211-212; Exhibit 3, Section B at Bates No. 274, and Bates Nos. 253-331].

Moreover, the fact that Respondent's convictions are classified as misdemeanors should not be considered as mitigation. As this Court stated in Lawyer Disciplinary Board v. Askin, 203 W. Va. 320, 323, 507 S.E.2d 683, 686 (1998), "[t]he issue is simply, as expressed in [Rule 3.18], whether the crime adversely reflects upon the lawyer's honesty,

trustworthiness or fitness as a lawyer. . . ." Despite Respondent's attempts to rationalize his conduct and his *nolo contendere* plea, the evidence clearly contradicts his version of events and casts doubt on his asserted "pure heart" motives. Again, the Hearing Panel Subcommittee, in reviewing the voluminous record, properly concluded that Respondent's rendition of the events in the mental hygiene petition was not accurate and not trustworthy and therefore, assessed little weight as mitigation.

II. CONCLUSION

Respondent has pled *nolo contendere* to crimes demonstrating professional unfitness within the meaning of Rule 3.18 of the Rules of Lawyer Disciplinary Procedure.[3] Respondent has violated Rule 8.4(b), Rule 8.4(c), and Rule 8.4(d) of the Rules of Professional Conduct which state in pertinent part:

> **Rule 8.4. Misconduct.**
>
> It is professional misconduct for a lawyer to:
>
> (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.
>
> (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
>
> (d). Engage in conduct that is prejudicial to the administration of justice.

Respondent has violated the Rules of Professional Conduct and the aggravating factors far outweigh any effect of mitigating factors. There is no evidence to suggest that Respondent should receive anything other than the ultimate sanction afforded by the Supreme

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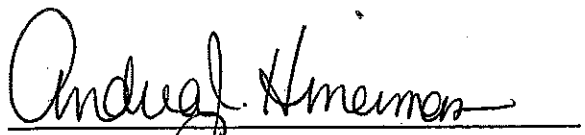
[3] "Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction." Syl. Pt. 2, Committee on Legal Ethics v. Six, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Court of Appeals of West Virginia in lawyer disciplinary matters: annulment of his law license.

Therefore, for the reasons set forth above, the Disciplinary Counsel urges this Honorable Court to reject Respondent's request for retroactivity and adopt the following recommended sanctions:

1. That Respondent's law license be annulled;
2. That prior to petitioning for reinstatement of his law license, Respondent shall undergo a comprehensive psychological examination by an independent licensed psychiatrist to determine if Respondent is fit to practice law;
3. That Respondent fully comply with any and all treatment protocol expressed by this licensed psychiatrist;
4. That prior to petitioning for reinstatement, Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; and
5. That, upon reinstatement, Respondent's practice be supervised for a period of one (1) year.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 30th day of May, 2013, served a true copy of the foregoing **"Reply Brief of the Lawyer Disciplinary Board"** upon Respondent H. John Rogers by mailing the same via United States Mail with sufficient postage, to the following address:

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